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Marvin M. Tincher

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PROPOSED STATUTORY REFORM IN THE LAW OF NEGLIGENT HOMICIDE IN KENTUCKY

MARVIN M. TINCHER*

Any effort to clarify or reform a phase of the law should be guided by a thorough study of the operation of the rules in existence at the time the proposed reform is advanced. Such a study has been attempted in the present article, both as to the existing law in Kentucky and as to advances already effected in other states. By surveying the development of the concept of negligent homicide, and the operation of varying statutes relating thereto in the different jurisdictions, a more intelligent effort can be made toward drafting for this state a statute or series of statutes which will embody sound legal principles and properly conform to public opinion.

No attempt has been made in the pages that follow to deal with that type of negligent homicide which is characterized as wanton or depraved, and for which a conviction of murder is proper.[1] The law of murder, except insofar as the statute provides penalties therefor, may well continue to be regulated by the common law until such time as a need is felt for statutory revision. Such a need is not strongly apparent at the present time.

However, in the field of manslaughter by negligence, the law in Kentucky is replete with seeming contradictions, and grossly out of harmony with the prevailing rules and concepts obtaining in most of her sister states. Accordingly, this study is submitted, embracing as it does a survey of common law background and present statutory regulation in representative jurisdictions. Additional consideration is given to the supplementary

* LL. B., 1941, University of Kentucky. Atty., Wage and Hour Division, 501 Medical Arts Building, Nashville, Tenn.

[1] A short discussion of the law of negligent murder may be found in a Note by the present writer, (1939) 28 Ky. L. J. 53.

offense of negligent homicide which has been created by statute in a number of states, either to extend criminal liability beyond the bounds of involuntary manslaughter, or in order to facilitate convictions in cases where death has been caused by the negligent operation of a motor vehicle.

I

Early commentators divided the crime of manslaughter into two classes, voluntary and involuntary. Voluntary manslaughter consisted in an intentional killing without malice, that is, one resulting from heat and passion upon sufficient provocation. Involuntary manslaughter, on the other hand, embraced two concepts, not always clearly distinguishable. The first was that an unintended homicide resulting from the doing of an unlawful act (not a dangerous felony) should be manslaughter. The second and closely allied situation was that in which death unintentionally was caused by the doing of an act, lawful in itself, without due caution and circumspection. Being thus disregardful of the safety of others and causing death thereby was considered a sufficient basis on which to predicate liability for involuntary manslaughter.[2]

The classic example of manslaughter by failure to exercise proper care is an hypothetical situation suggested by Kelyng, J., in reporting on *Hull's Case*.[3] In *Hull's Case* a workman threw a piece of timber from the second story of a building under construction, and despite his warning for everyone to stand clear, the timber struck and killed a man. The homicide was held to be misadventure, the workman having taken the usual precaution in such a situation, but the judges agreed that had the accident taken place in London where people are constantly passing, it would have been manslaughter.[4]

The frequently discussed case of James Rampton serves to illustrate the views of early writers on this subject. The defendant had found a soldier's pistol in the street and on reach-

[2] 4 Blackstone's Commentaries, 191; 1 East, Pleas of the Crown (1803) 262; Foster, Crown Law (2d ed. 1791) 262-263.

[3] Kelyng, 40, 84 Eng. Rep. 1072 (1664).

[4] Foster, in his *Crown Law*, preferred to put a limitation on the view expressed by Kelyng. It was his opinion that if the incident had taken place in early morning when few or no people were stirring, and ordinary caution had been used, the death would properly be misadventure. *Id.* at 263.

ing home he tried it with the rammer to see whether it was loaded. The gun not appearing to be loaded, defendant pointed it toward his wife and let fall the hammer whereupon the gun discharged and defendant's wife was killed. He was convicted of manslaughter.[5] The propriety of the decision, however, has been questioned; Foster said of it that "the law in these cases doth not require the utmost caution that can be used," and it was his opinion that the defendant had exercised the ordinary and usual precautions in such a case.[6]

A somewhat similar situation was presented in a case before Judge Foster and a different result was reached. In this case the defendant and his wife went to visit a neighbor, the defendant carrying his gun along. Before dinner he discharged the gun and set it away. While defendant was away at church a friend loaded the gun and went hunting, but returned it to the same place, still loaded, before defendant came from church. Upon the latter's return home he took up the gun and in so doing touched the trigger, causing it to fire and kill his wife. Defendant was acquitted under direction by Judge Foster that if defendant had reasonable grounds to believe that the gun was not loaded he could not be guilty of manslaughter.[7]

Despite the disapproval expressed by the early commentators toward the decision in *Rampton's Case,* the same result was reached two hundred years later in an almost identical case, *State v. Hardie.*[8] There the defendant, in sport to frighten a neighbor woman, pointed an old revolver at her. The gun, which had been found five years previously, which had been snapped repeatedly, and which everyone considered as harmless, discharged and the woman was killed. In affirming a conviction of manslaughter the Iowa court said:

"Human life is not to be sported with by the use of firearms, even though the person using them may have good reason to believe that the weapon used is not loaded, or that being loaded it will do no injury."[9]

In each of these three cases, it is clear that the homicide was unintentional. Furthermore it is evident that the death

[5] Kelyng, 41, 84 Eng. Rep. 1073 (1664).
[6] Foster, *op. cit. supra* note 2, at 264. East concurs with Foster in doubting the legality of the conviction in *Rampton's Case.* East, *op. cit. supra* note 2, at 267.
[7] Foster, *op. cit. supra* note 2, at 265.
[8] 47 Iowa 647 (1878).
[9] *Id.* at 649-50.

in each case was very much contrary to the desires and expectations of the person causing it. Clearly the case arising before Foster was correctly decided because there is no indication that the defendant in that case was at all negligent. Having reason to believe the gun unloaded and handling it in an ordinary manner, he was behaving as the reasonable man would behave. However, reasonable men do not point and snap even an unloaded gun at people without making absolutely certain of its harmless condition. To do so is to follow a reckless course of conduct which, if resulting in death, should make the actor criminally liable, and that would seem to be the ground on which the other two cases can be sustained.

Another early case, decided before Lord Chief Justice Hale, helped to define the boundary between manslaughter and death by misadventure. A carter had run over and killed a child in the street. The court directed that if the driver had seen the child but nevertheless drove upon it, he would be guilty of murder; that if he was driving carelessly and thereby failed to see the child it would be manslaughter; but that if the child ran across the way and was run over before the carter could stop, its death would be *per infortunium*.[10]

* * * *

One hundred and fifty years brought no ostensible change in the law of involuntary manslaughter. In 1828 a carter again was convicted of manslaughter for running over a child. The court said that by being in the cart instead of at the horse's head, the defendant was negligent; death having been caused by such negligence, he was guilty of manslaughter.[11]

However, in 1830 the English court introduced the phrase "gross want of care," supposedly as a prerequisite to criminal liability based on negligence.[12] Again, in 1836, in a prosecution for manslaughter the court observes: "The question here is, whether you are satisfied that the prisoner was driving in such a negligent manner that, *by reason of his gross negligence*, he had lost command of his horses?"[13] (italics added).

Although recent English cases involving manslaughter by negligent driving are singularly rare, it may safely be assumed

[10] 1 Hale, Pleas of the Crown (1778) 476.
[11] Knight's Case, 1 Lewin 168, 168 Eng. Rep. 1000 (1828).
[12] Ferguson's Case, 1 Lewin 182, 168 Eng. Rep. 1005 (1830).
[13] Rex v. Timmins, 7 Car. & P. 498, 173 Eng. Rep. 221, 222 (1836).

that gross negligence is still required.[14] The clearest expression of the position of the English court on this point comes from a civil case, *Tinline* v. *White Cross Ins. Ass'n, Ltd.*,[15] in which the court states: "The crime of manslaughter in a case like this consists in driving a motor car with gross or reckless negligence. Ordinary negligence does not make a man liable for manslaughter."[16]

Thus, although manslaughter by negligence remained, as Blackstone defined it, the doing of an act lawful in itself "but without due caution and circumspection," the requirement of "gross want of care" or "gross negligence" had developed. This requirement of something more than ordinary negligence as a basis for criminal liability has been almost universally accepted today.[17] Its acceptance has resulted in frequent lengthy dissertations by judges and text writers concerning the "added degree" and the nature of such negligence as gives rise to criminal liability.[18]

The overwhelming weight of modern American cases clearly indicates that some equivalent of gross negligence or recklessness is required for a conviction of manslaughter.[19] A good illustrative case is that of *Kimmel v. State*,[20] in which the defendant had been convicted of manslaughter caused by reckless driving. In reversing for insufficiency of the allegations, the Indiana court said:

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[14] Davis, *The Development of Negligence as a Basis for Liability in Criminal Homicide Cases* (1938) 26 Ky. L.J. 209, 220.

[15] (1921) 3 K.B. 327.

[16] *Id.* at 330.

[17] Reg. v. Nicholls, 13 Cox C.C. 75 (1874); Reg. v. Elliott, 16 Cox C.C. 710 (1889); People v. Anderson, 310 Ill. 389, 141 N.E. 727 (1923); State v. Lester, 127 Minn. 282, 149 N.W. 297 (1914); People v. Angelo, 246 N.Y. 451, 159 N.E. 394 (1927); May, Crim. Law (4th ed. 1938) sec. 27; Davis, *supra* note 14, at 228.

[18] Hampton v. State, 50 Fla. 55, 39 So. 421 (1905); State v. Lester, 127 Minn. 282, 149 N.W. 297 (1914); Stehr v. State, 92 Neb. 755, 139 N.W. 676 (1913); 3 Stephen, Hist of Crim. Law of Eng. (1883) 11.

[19] Reckless driving: Cannon v. State, 91 Fla. 214, 107 So. 360 (1926); People v. Falkovitch, 280 Ill. 321, 117 N.E. 398 (1917); Kimmel v. State, 198 Ind. 444, 154 N.E. 16 (1926); State v. Thomlinson, 209 Iowa 555, 228 N.W. 80 (1929); Com. v. Guillemette, 243 Mass. 346, 137 N.E. 700 (1923). Firearms: People v. Buzan, 351 Ill. 610, 184 N.E. 890 (1933); Murphy v. Com., 15 Ky. L. Rep. 215 (1893); York v. Com., 82 Ky. 360 (1884). Negligence of physician: Com. v. Pierce, 138 Mass. 165 (1884). See also Davis, *supra* note 14, who criticises the rule as illogical, and advocates the application of the tort standard to cases involving dangerous instrumentalities.

[20] 198 Ind. 444, 154 N.E. 16 (1926).

"And under the rules of common law it is only negligence in doing such acts as will probably endanger life and limb which constitutes that 'gross and culpable negligence' that amounts to an 'unlawful act' within the definition . . . in all jurisdictions that adhere to the common law definition of manslaughter, the affirmance of such judgments (involuntary manslaughter by negligence) invariably has been on the ground that the injury and death were shown to have resulted from negligence in doing something obviously dangerous to others which the defendant had attempted to do in wanton and reckless disregard of their safety."[21]

II

Typical of the statutes defining manslaughter by negligence is that of New York, which provides:

"Such homicide is manslaughter in the second degree when committed without a design to effect death:

. . . . . .

3. By any act, procurement or culpable negligence of any person, which, according to the provisions of this article does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree."[22]

The punishment for this offense is imprisonment not to exceed fifteen years or a fine up to $1000 or both.[23]

Statutes almost identical with that of New York are to be found in Minnesota,[24] New Hampshire,[25] North Dakota,[26] and South Dakota.[27] California, Idaho, Montana, New Mexico, and Utah classify homicide by negligence as involuntary manslaughter if resulting "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."[28] An Arkansas statute provides essentially the same definition: "If the killing be . . . in the prosecution of a lawful act, done without due caution and circumspection, it shall be manslaughter."[29] Colorado, Georgia, and Illinois in almost the same words define involuntary manslaughter as killing without intent "in the commission of an unlawful act, or a lawful act, which probably might produce

[21] *Id.* at 17.
[22] 1 Laws of New York (Thompson's, 1939), sec. 1052.
[23] *Id.* at sec. 1053.
[24] Minn. Stat. (Mason's, 1927), sec. 10078.
[25] 2 N. H. Pub. Laws (1926), c. 392, sec. 9.
[26] Comp. Laws of N. D. (1913), sec. 9491.
[27] 1 Comp. Laws of S. D. (1929), sec. 4024.
[28] Cal. Penal Code (Deering's, 1937), sec. 192; 1 Idaho Code Ann. (1932), sec. 17–1106; 5 Mont. Rev. Codes (1935), sec. 10959; N. M. Stat. Ann. (Courtright's, 1929), sec. 35–305; Utah Rev. Stat. (1933), sec. 103–28–5.
[29] I Dig. Stat. of Ark. (Pope's, 1937), c. 42, sec. 2982.

such a consequence, in an unlawful manner."[30] Wisconsin has the crime of manslaughter in the fourth degree which embraces killing by gross negligence.[31]

Penalties for involuntary manslaughter, or manslaughter in the second degree (which corresponds to involuntary manslaughter generally) range from imprisonment in the county jail not exceeding one year in Colorado and Utah,[32] to a possible fine of $10,000 and imprisonment for 30 years in Delaware.[33] In between these extremes are Kentucky and Georgia punishing the offense simply with fine and imprisonment;[34] Michigan, Minnesota, and New York may imprison not exceeding fifteen years, or fine up to $1000, or both;[35] California and Indiana imprison not exceeding ten years,[36] while Wisconsin for fourth degree manslaughter imposes a penalty of imprisonment for one to two years, or a jail sentence not exceeding one year, or fine up to $1000, or both such fine and imprisonment.[37]

Probably the mean of the varying penalties is most nearly approached in the statute of North Dakota which provides:

"Every person convicted of manslaughter in the second degree shall be punished by imprisonment in the penitentiary not less than one and not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment."[38]

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[30] 2 Ann. Stat. of Colo. (Courtright's, 1928), sec. 1757; 6 Ann. Code of Ga. (Park's, 1914), sec. 67; Ill. Rev. Stat. (1937), c. 38, sec. 363.

[31] Wis. Stat. (1939), sec. 340.26.

[32] 2 Ann. Stat. of Colo. (Courtright's, 1928), sec. 1758; Utah Rev. Stat. (1933), sec. 103–28–6.

[33] Rev. Code of Del. (1935), c. 149, sec. 5.

[34] 6 Ann. Code of Ga. (Park's, 1914), sec. 69; Conner v. Com., 76 Ky. (13 Bush) 714, 720 (1878).

[35] Comp. Laws of Mich. (1929), sec. 16717; Minn. Stat. (Mason's, 1927), sec. 10086 (1 to 15 years); 1 Laws of N. Y. (Thompson's, 1939), sec. 1053.

Michigan, like Delaware, neither defines nor grades manslaughter but punishes the common law offense known as such. The Michigan Supreme Court adheres to the common law disitnction between voluntary and involuntary manslaughter, and in sustaining a conviction of the latter offense it made this clarifying statement: "The claim is that, while doing a lawful act in driving his automobile, he did it in such a negligent manner that it amounted to gross negligence on his part. This would clearly bring the case within the definition of involuntary manslaughter." People v. Ryczek, 224 Mich. 106, 194 N. W. 609, 611 (1923).

[36] Cal. Penal Code (Deering's, 1937), sec. 193; 4 Ann. Ind. Stat. (Burns, 1933), sec. 10–3405 (1 to 10 years).

[37] Wis. Stat. (1939), 340.27.

[38] Comp. Laws of N. D. (1913), sec. 9475.

In addition to manslaughter by the "culpable negligence of any person," the New York Legislature enacted in 1936 a provision creating the offense of "criminal negligence in the operation of a vehicle resulting in death," which is punishable by imprisonment for a term not exceeding five years or a fine up to $1000, or both. The offense is described as follows:

"A person who operates or drives any vehicle of any kind in a reckless or culpably negligent manner, whereby a human being is killed, is guilty of criminal negligence in the operation of a vehicle resulting in death."[39]

While most states have statutes essentially embodying the crime of manslaughter by negligence,[40] the second New York statute set out above represents a comparatively recent trend in the criminal law. In 1921 Michigan enacted the first legislation creating the separate offense of negligent homicide committed in the operation of a vehicle. The Michigan act, which has been substantially copied by a number of other states, provides as follows:

"Section 1. Every person who, by the operation of any vehicle at an immoderate rate of speed or in a careless, reckless or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of the crime of negligent homicide and upon conviction shall be sentenced to pay a fine not exceeding one thousand (1,000) dollars, or to undergo imprisonment in the state prison for a period not exceeding five (5) years, or by both such fine and imprisonment in the discretion of the court."[41]

As has been already stated,[42] involuntary manslaughter in Michigan requires gross negligence, a term which the Michigan court has said "means wantonness and disregard of the consequences which may ensue, and indifference to the rights of others that is equivalent to a criminal intent."[43] It can be seen, therefore, that the crime of negligent homicide created by Section 16743 supplements the crime of manslaughter and it has been so held. In the case of *People v. Campbell*[44] the court said:

"By the enactment of this statute, the Legislature of 1921 obviously intended to create a lesser offense than involuntary manslaughter or common law negligent homicide, where the negligent killing was caused by the operation of a vehicle. To do this it eliminated as necessary elements of the lesser offense negligence classed as wanton

[39] 1 Laws of New York (Thompson's, 1939), sec. 1053a.
[40] See Notes (1936) 25 Ky. L. J. 70; (1936) 25 Ky. L. J. 78.
[41] Comp. Laws of Mich. (1929), sec. 16743.
[42] *Supra* note 35.
[43] People v. Barnes, 182 Mich. 179, 148 N. W. 400, 407 (1914).
[44] 237 Mich. 424, 212 N. W. 97, 99 (1927).

or willful. Included in these terms is gross negligence. So that, in the enactment of the statute, there was expressly eliminated as elements of the crime all negligence of such character as to evidence a criminal intent; and, as we have before pointed out, wanton or willful or gross negligence was of that character. Therefore this statute was intended to apply only to cases where the negligence is of a lesser degree than gross negligence."

In 1925 Vermont followed the example set by Michigan, creating an unnamed offense punishable by five years imprisonment, $2000 fine, or both, for death resulting from careless or negligent operation of a motor vehicle.[45] The word "reckless" found in the Michigan statute was not included.

Louisiana followed suit in 1930 by creating the statutory crime of involuntary homicide punishable by imprisonment for a term not to exceed five years.[46] The Louisiana act, however, requires that the operation of the vehicle causing death be in a *grossly* negligent or *grossly* reckless manner before liability arises.

According to the Louisiana court, the new crime of involuntary homicide "is nothing more nor less than involuntary manslaughter, committed by the grossly negligent use or operation of a vehicle."[47] The court further clarifies its position in a later case by saying:

"The act of 1930 provides, in effect, merely that involuntary manslaughter committed by the grossly negligent use or operation of a vehicle shall be subject to a less severe penalty than that which is prescribed for involuntary manslaughter committed otherwise, if the district attorney charges the defendant—or the jury convicts him—of involuntary homicide instead of manslaughter."[48]

Thus it appears that the offense embrace only cases which are also covered by the definition of manslaughter, although it is put in a class by itself.[49]

California in 1935 added the crime of negligent homicide as a part of the state Vehicle Code.[50] Section 500 provides:

"When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any vehicle in a negligent manner or in the commission of an unlawful act not amounting to a felony, the person so operating such vehicle shall be guilty of negligent homicide, a felony, and upon conviction thereof shall be punished by imprisonment in the county jail for not more than one year or in the State prison for not more than three years."

[45] Pub. Laws of Vt. (1933), sec. 5152.
[46] La. Crim. Code (Dart's, 1932), sec. 1047.
[47] State v. Flattman, 172 La. 620, 135 So. 3, 6 (1931).
[48] State v. Williams, 173 La. 1061, 139 So. 481 (1932).
[49] State v. Porter, 176 La. 673, 146 So. 465, 467 (1933).
[50] Cal. Vehicle Code (Deering's, 1937), sec. 500.

In *People* v. *Warner*,[51] the California Court of Appeals affirmed a conviction under this provision, holding that it is not necessary to prove criminal negligence to establish the offense of negligent homicide. The court found that the intention of the legislature in enacting section 500 of the Vehicle Code was to define a crime different from that provided for in the definition of manslaughter, and to cover a different class of crimes than those within the purview of the Penal Code. It then observed that the state need prove, in addition to the jurisdictional facts of time and place, only that the defendant was driving a motor vehicle in a negligent manner and that such driving resulted in the death of another person.[52]

The motivating factors leading to creation of the offense of negligent homicide are not always evident from the wording of the statute. An excellent discussion of the purposes attributed by the courts to the legislatures passing such statutes is found in Mr. Riesenfeld's article *Negligent Homicide—A Study in Statutory Interpretation.*[53] In a number of jurisdictions, as he points out, the new offense overlaps the crime of manslaughter, and it would appear that in those states the primary purpose of the legislature in creating the new offense was to obtain convictions that could not be obtained under the more severe penalties imposed for manslaughter.[54] Those states in which the negligent homicide is likewise manslaughter are Louisiana, Nebraska, Wyoming, Canada, and apparently New Hampshire and Vermont. In California and Michigan the negligent homicide statute operates to extend criminal liability to situations where the manslaughter statute is inapplicable, though there is some overlapping of the two crimes. In New Jersey, one who causes death by heedless driving in wanton disregard of the safety of others is guilty of a misdemeanor.[55] This statute seems to prevent such homicides from being manslaughter, though the latter offense was formerly held to include them.[56] Likewise, in Connecticut one who causes death

[51] 27 Cal. App. (2d) 190, 80 P. (2d) 737 (1938).
[52] *Id.* at 739.
[53] (1936) 25 Calif. L. Rev. 1.
[54] Louisiana clearly falls into this category. *Id.* at 16 and 21.
[55] 1 Rev. Stat. of N. J. (1937), sec. 2–139–9.
[56] State v. Dugan, 84 N.J.L. 603, 89 Atl. 691 (1913), *aff'd*, 85 N. J. L. 730, 89 Atl. 1135 (1914); State v. Blaine, 5 N.J. Misc. R. 633, 137 Atl. 892 (1927), *aff'd*, 104 N. J. L. 325, 140 Atl. 566 (1928).

by the grossly negligent operation of a motor vehicle commits a special statutory offense rather than the crime of manslaughter,[57] although, as in New Jersey, such homicide was manslaughter prior to the passage of the statute.[58]

III

No statutory provision is made in Kentucky with regard to the crime of involuntary manslaughter. Section 1150 of the Kentucky Statutes[59] fixes the punishment for voluntary manslaughter but does not define the offense. The only provision relating to a felonious unintentional killing is Section 1151, which is limited to wilfully striking, stabbing, thrusting, or shooting. Involuntary manslaughter, as delineated by Blackstone is left to be punished only by fine and imprisonment in the county jail, the common law punishment for non-capital offenses not regulated by statute.[60]

As a result, no doubt, of a feeling on the part of Kentucky courts that many cases of unintentional homicide merited a more severe penalty, the crime of voluntary manslaughter has been expanded, without the aid of statutory definition, to include homicides produced through negligence. By a not unusual process of judicial mental gymnastics the Kentucky Court of Appeals has found that even though a person unintentionally shot and killed another, he must be presumed to have intended the consequences of his acts and therefore is guilty of voluntary manslaughter.

An illustration may be found in the case of *York v. Commonwealth*,[61] in which the defendant had been convicted of voluntary manslaughter and sentenced to five years imprisonment. The evidence on which the conviction was affirmed indicated that the defendant caused the death of the deceased by the reckless and careless handling of a shotgun while assisting in an arrest.[62] The court approved an instruction that if:

[57] 2 Conn. Gen. Stat. (1930), sec. 6047.
[58] State v. Campbell, 82 Conn. 671, 74 Atl. 927 (1910).
[59] Carroll's, 1936.
[60] See Conner v. Com., 76 Ky. (13 Bush) 714, 720 (1878). See also instructions on involuntary manslaughter in Jones v. Com., 213 Ky. 356, 361, 281 S. W. 164, 167 (1926); Morris v. Com., 255 Ky. 276, 279, 73 S. W. (2d) 1, 2 (1934).
[61] 82 Ky. 360 (1884).
[62] *Id.* at 365.

"the shooting and killing of Kirkpatrick was accidental and was done by defendant in the recklessly careless use or handling of a loaded deadly gun, then in his hands, they [the jury] should find him guilty of manslaughter and fix his punishment at confinement in the penitentiary for not less than two nor more than twenty-one years."[63]

The court quoted from Wharton[64] a section containing the following: "But even where the business is perfectly legal, negligence in the discharge of it, when producing homicide, is manslaughter." It appears, however, to have escaped the court that such a homicide was *involuntary* manslaughter at common law[65] and that the defendant was convicted of voluntary manslaughter, the common law definition of which had not been changed by the statute.[66]

Further illustration may be found in the case of *Largent v. Commonwealth*,[67] in which a conviction of voluntary manslaughter and sentence of five years imprisonment were upheld. According to the evidence the defendant caused the death of the deceased by "recklessly and wantonly" driving into and colliding with another car. The court quoted from *King v. Commonwealth*[68] the following rule:

"It is well settled that if one operates an automobile upon the highway and recklessly, wantonly, and with gross carelessness strikes and kills another, he is guilty of voluntary manslaughter [citing Jones v. Com.[69]] This principle is based upon the theory that a man intends the natural consequences of his act and that he is aware or ought to be aware of what will result from the reckless or grossly careless operation of an automobile, which becomes a dangerous

[63] *Id.* at 366. The court in *Spriggs* v. *Commonwealth*, 113 Ky. 724, 68 S.W. 1087 (1902) disapproves of the *York* case, but on the ground that the instruction there given did not contain the limiting adjective "voluntary." It did not disapprove of the instruction as improperly defining what the court conceived to be the crime of voluntary manslaughter.

[64] 2 Wharton, American Criminal Law (6th ed. 1868), sec. 1004.

[65] 4 Blackstone's Commentaries, 191; 2 Wharton, *op. cit. supra* note 64, secs. 931–933.

[66] Gen. Stat. of Ky. (1881), c. 29, art. 4, sec. 1, now Ky. Stat. (Carroll's, 1936) 1150.

York v. *Commonwealth* was criticised by Judge Du Relle in *Spriggs* v. *Commonwealth*, 113 Ky. 724, 68 S.W. 1087 (1902), for failing to distinguish, in defining manslaughter, between voluntary and involuntary manslaughter. It is evident, however, from a reading of the opinion in *York v. Commonwealth* that the instruction there set out had reference to the crime of voluntary manslaughter for which the statute imposed a penalty of imprisonment for two to twenty-one years.

[67] 265 Ky. 598, 97 S.W. (2d) 538 (1936).

[68] 253 Ky. 775, 777, 70 S.W. (2d) 667, 668 (1934).

[69] 213 Ky. 356, 281 S.W. 164 (1926).

instrumentality under such circumstances, although he actually has no intention to kill."[70]

In addition there is another peculiarity in connection with Kentucky's law on involuntary manslaughter. While the rule as developed by common law limited criminal liability for negligent homicide to those cases in which the negligence was gross, culpable, or reckless, it would appear that in some situations ordinary lack of care is a sufficient basis in this state. In the case of *Jones v. Commonwealth*[71] the defendant was convicted of manslaughter for having run over and killed a child with his automobile. In reversing the judgment because of misconduct of counsel, the court recommended, inter alia, an instruction substantially as follows:

If the jury believe from the evidence that the defendant carelessly and negligently, and in the absence of such care as an ordinarily prudent person would exercise under similar circumstances, ran into and killed the deceased, they should find him guilty of involuntary manslaughter and fix his punishment at a fine in any sum, or imprisonment in the county jail for any period, or both.[72]

An explanation for such an instruction in a case of this kind is set out in an earlier Kentucky case, *Held v. Commonwealth*.[73] In affirming a conviction of involuntary manslaughter based on the defendant's having negligently driven over and killed a boy, the court said:

". . . there can be no doubt that under the decisions of this court, carelessness or negligence or recklessness in the performance of a lawful act, which results in the death of another, is always unlawful and criminal if the agency employed was at the time and place of a character that its negligent or reckless use was necessarily dangerous to human life or limb or property; and this dangerous character of the agency employed has been accepted in this state, in a long line of decisions, as sufficient to render a reckless or negligent or careless use criminal, upon the theory, no doubt, that the want of ordinary care in the use of such an instrumentality in the presence of others or upon a crowded thoroughfare in a city, or where others are naturally expected to be, is gross negligence, and it is quite apparent that such a position is logically correct, for there are many instrumentalities of death with reference to which a want of ordinary care in proximity to others is carelessness of the grossest kind."[74]

In other words, the court is saying that failure to use ordinary care in driving on a city street amounts to gross negligence, for

[70] Largent v. Com., 265 Ky. 598, 604-5, 97 S.W. (2d) 538, 542 (1936).
[71] 213 Ky. 356, 281 S.W. 164 (1926).
[72] *Id.* at 361-2, 281 S.W. at 167 (Instructions 1 and 3 combined).
[73] 183 Ky. 209, 208 S.W. 772 (1919).
[74] *Id.* at 213-14, 208 S.W. at 774.

which criminal liability is imposed if death results. Despite the logic conjured up by the court to sustain its position, it appears that the Kentucky view is shared by only one or two other states.[75]

IV

Statutory reform along paths outlined in the preceding sections necessitates a determination of policy. Since the principal source of prosecutions for unintentional homicides derives from the operation of motor vehicles, special consideration needs to be given such homicides. Is it desirable to create a criminal offense to punish all who negligently cause death while driving, or is it better that they be punished as at common law only if their conduct was grossly and culpably negligent? Still other factors require consideration, since homicides continue to result from negligent use of firearms, negligent prescription and administration of medical treatment, and even negligent handling of building materials.

In the first place, separate reference to unlawful act and lawful act performed in a negligent or unlawful manner should be discontinued. The unlawful act rule has been so pruned and restricted that today little of it is left. Such pruning bears articulate witness to the disfavor into which the rule has fallen with the courts. Its first limitation resulted when the courts began to require that the unlawful act be *malum in se* in order to form the basis for a conviction of manslaughter in the absence of some other factor making the homicide such.[76] The second limitation is the now general requirement that the unlawful act must itself be the proximate cause of the death.[77] It is no longer sufficient that the act producing death concur in point of time with an unlawful act *malum in se*.[78] The unlawful act must be proximately responsible for the death before the rule is applicable.

The entire concept that a homicide should be manslaughter if resulting from an unlawful act is subject to the same criti-

[75] Davis, *supra* note 14, at 228. See also Riesenfeld, *supra* note 53, at 31. But see Wilner, *Unintentional Homicide in the Commission of an Unlawful Act* (1936) 87 U. of Pa. L. Rev. 811, 835.

[76] See Riesenfeld, *supra* note 53, at 24; Note (1939) N. Y. U. L. Q. Rev. 290, 295.

[77] People v. Townsend, 214 Mich. 267, 183 N. W. 177, 179 (1921).

[78] Tennessee, Maine, and Texas are contra. See Riesenfeld, *supra* note 53, at 26; Wilner, *supra* note 75, at 834.

cism as the ancient felony murder doctrine. To paraphrase somewhat Justice Holmes' observation on the latter:

> If the object of the rule is to prevent accidents resulting in death, it should make accidental killing manslaughter; while, if its object is to prevent driving while drunk,[79] it would do better to treat as a felon one drunken driver in every thousand by lot.[80]

The case of *Voltre v. State*[81] illustrates the fundamental weakness of the unlawful act doctrine. There the defendant, contrary to law, gave whiskey to a minor. The whiskey caused her to suffer a heart attack from which she died. The Indiana court reversed a conviction of manslaughter, stating that for a conviction the homicide must follow, both as a concomitant of the commission of an unlawful act, and as a natural and probable consequence thereof. It can be seen that the application of this test obviates any consideration of the lawfulness or unlawfulness of the defendant's acts. By making liability for manslaughter dependent upon whether death was foreseeable, the court escapes the possibility of such criticism as was voiced by Holmes to the felony murder doctrine.

In order to forestall possible future disputation over degrees of negligence and degrees of care, the words "negligence" and "gross negligence" will be omitted from the statute. When jurors learn from the hand of the judge that negligence is conduct producing an undesirable but unintended result, that gross negligence is merely a higher degree of the same thing, but that this higher degree makes a person guilty of voluntary manslaughter because he is held to have intended the natural and probable consequences of his acts, they are likely to wonder at this legal hoi-polloi. Then when it is learned that negligence is lack of ordinary care, and is not sufficient for criminal liability, but that lack of ordinary care with an automobile on a city street is gross negligence for which criminal liability is imposed, the juror must indeed marvel at such labyrinthine profundity and he no doubt concludes that any result reached under such a rule can be justified. By the judge's own instructions, lack of ordinary care in driving down Main Street is gross carelessness for which the driver is held to have intended all natural

[79] or driving in excess of the speed limit, or giving a child excess quantities of liquor, or throwing a child into the water to swim or sink (or any other unlawful act *malum in se*).

[80] Holmes, The Common Law (1881) 57–59.

[81] 192 Ind. 684, 138 N.E. 257 (1923).

and probable consequences. If a death is caused thereby, it must be treated as intentional. If in addition there is evidence requiring an instruction on murder, the jury learns that an unjustifiable intentional killing, not accompanied by alleviating circumstances of provocation and hot blood, is classed as murder. Then the conscientious juror might well find himself in a serious quandary. Taking all the instructions together, instructions based upon opinions handed down by the Kentucky Court of Appeals, if he concludes that the defendant merely failed to exercise ordinary care in his driving, thereby causing a death, the juror might find the defendant guilty of murder.[82]

It is the opinion of the writer that the phrase "gross negligence" can be eliminated altogether and one less conducive to confusion and loose thinking be substituted in its place. The need for such a substitute is very ably met by "reckless disregard," a phrase to which no seriously objectionable concepts have attached. "Reckless disregard," widely used in this connection already, aptly describes that "something more than ordinary negligence" which "imports" a "heedless indifference" to the rights and safety of others.[83]

While it will remain impossible for the courts to pass to the jury a measuring cup with which to evaluate the conduct of the party on trial, it will be no more difficult than formerly to explain that reckless disregard is such negligence as constitutes a crime against the state; that it means negligence

"of a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or. . . that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows . . .[84] recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them."[85]

[82] Though this reasoning may bear strong resemblance to that of the March Hare in Carroll's *Alice in Wonderland*, it nevertheless illustrates the mystifying nature of legal opinions in which the court has recourse to such fictions as that of holding that a person must have intended the natural and probable consequences of his acts.

[83] Quotations from State v. Rountree, 181 N. C. 535, 106 S. E. 669, 671 (1921).

[84] The word "wantonness" is deleted from this quotation because, in the writer's opinion, its use should be confined to those cases where the negligence is so great as to show a "depraved mind" or a "heart regardless of social duty;" in other words, where a conviction of murder is in order. See Note (1939) 28 Ky. L. J. 53.

[85] Cannon v. State, 91 Fla. 214, 107 So. 306, 363 (1926).

In view of the foregoing discussion, therefore, the following statutory definition is proposed for Kentucky, a definition which is simple and which preserves in general the common law connotation of the crime:

Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds:

1. Voluntary—upon a sudden quarrel or heat of passion.
2. Involuntary—as an unintended proximate result of any act performed in a manner evincing a reckless disregard for human life and safety. Being recklessly disregardful shall mean negligently creating a risk to others which a reasonably prudent man would consider substantially likely to cause serious bodily injury. It shall not necessarily mean an intentional creation of risk.

Penalties for the two grades of this offense, based on the study found in Part II, will be as follows:

1. Whoever shall be guilty of voluntary manslaughter shall be confined in the penitentiary not less than two nor more than twenty-one years.[86]
2. Any person found guilty of involuntary manslaughter shall be confined in the penitentiary not less than one nor more than fifteen years, or fined any sum not exceeding one thousand dollars, or both such fine and imprisonment may be imposed.[87]

There remains the question of whether a need exists for a special negligent homicide statute applicable only to homicides caused by negligent operation of motor vehicles. Such a statute was considered desirable in Louisiana "to facilitate convictions"[88] though not to extend the scope of criminal homicides. In Michigan and California its purpose was to extend criminal liability to situations where a manslaughter conviction could not be had.[89] In these states the law was passed "to curb reckless, careless, and negligent driving which caused death, in cases where the negligence was less than gross."[90] It is complementary to the crime of manslaughter, covering the field of merely negligent acts causing death.[91]

[86] Unchanged from Ky. Stat. (Carroll's, 1936), sec. 1150.

[87] The penalty here provided for involuntary manslaughter is greater than that imposed under the existing law of Kentucky. However, the crime as herein defined will embrace many of the convictions of voluntary manslaughter under the present law. The proposed penalty is the same as that in Michigan and New York. *Supra* note 35.

[88] Riesenfeld, *supra* note 53, at 16.

[89] *Id.* at 33.

[90] People v. McMurchy, 249 Mich. 147, 228 N. W. 723, 728 (1930).

[91] Riesenfeld, *supra* note 53, at 11 and 33.

Inasmuch as the Kentucky court has held that lack of ordinary care in driving subjects the driver to liability for involuntary manslaughter, if he causes death thereby, a statute similar to that of Michigan and California would be in line with such holdings. And, since the proposed definition of involuntary manslaughter is intended to abrogate the rule of the *Held* case,[92] criminal liability based on failure to observe ordinary care in driving will depend upon a complementary statute.

The statutes adopted by California and Michigan may be taken as evidence of the need for an extension of criminal liability to homicides caused by less than "gross" negligence or reckless disregard, where they result from negligent driving. That a similar need is felt in Kentucky may be surmised from the unusual and somewhat strained interpretation of the Kentucky court that want of ordinary care in the operation of vehicles constitutes gross negligence. Therefore it is proposed that a statute be passed creating the crime of negligent homicide which crime shall consist in causing death by the negligent driving of a motor vehicle.

Such a statute could be made to read as follows:

Section 1. When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any motor vehicle in a negligent manner, the person so operating such vehicle shall be guilty of the crime of negligent homicide. Upon conviction thereof he shall be punished by imprisonment in the penitentiary from one to two years, or by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.[93]

Section 2. Provided that this act shall not repeal or affect the law of manslaughter, and the Attorney for the Commonwealth may, in his discretion, charge with manslaughter persons who cause death in the negligent operation of any motor vehicle, and the crime of negligent homicide shall be deemed to be included within every such charge of manslaughter, and shall be a responsible verdict under the said charge, and if the person so charged be found not guilty of manslaughter, a verdict of negligent homicide may be rendered by the jury.[94]

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[92] 183 Ky. 209, 208 S.W. 772 (1919), cited *supra* note 73.

[93] This definition, though not the penalty, differs from that in the California statute in two particulars: 1. In omitting the phrase "or in the commission of an unlawful act not amounting to a felony." The reason for this omission is the same as that expressed *supra* in connection with omission of the same clause from the definition of involuntary manslaughter. 2. In limiting the class to motor vehicles rather than to vehicles in general. Since the occasion for the special statute is the increasing number of deaths being caused by the negligent operation of motor vehicles, it is not considered desirable that the statute be made to apply outside that field.

[94] Essentially the same as La. Crim. Code (Dart's 1932), sec. 1049.

Section 2, providing that a conviction of negligent homicide shall be a responsible verdict under an indictment for manslaughter, is inserted to relieve the Commonwealth's Attorney of the burden of charging the defendant with two crimes, when it is uncertain whether reckless disregard can be proved. It is assumed, of course, that if the jury which is considering a manslaughter charge finds the defendant guilty of negligence amounting to reckless disregard, it will convict him of manslaughter, but that if the negligence was less than reckless disregard, the defendant will be convicted only of negligent homicide.

* * * *

It has been the purpose of this article to suggest a means whereby the legislative assembly may reframe and clarify Kentucky's law of homicide by negligence. In order that this phase of the law may be as intelligible as possible to the trial courts and to juries, some such simplification as has been proposed must needs be adopted. The writer believes that the suggested statutory reform has two important considerations in its favor: First, it would put Kentucky in line with the more progressive states, both with regard to the law of involuntary manslughter and to that of homicide caused by negligent operation of a motor vehicle. Second, it would simplify the definitions of the negligent homicide offenses, thereby inducing better understanding of the law relating thereto.